

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 22, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP2390-CR**

**Cir. Ct. No. 2013CF2127**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**KAYRON LARON FORTUNE,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Kessler, J., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Kayron Laron Fortune appeals a judgment convicting him of possession of designer drugs, possession of cocaine, and possession of THC, all with intent to deliver. See WIS. STAT.

§§ 961.41(1m)(hm)2., (1m)(cm)1r., and (1m)(h)2. (2013-14).<sup>1</sup> He also appeals an order denying his motion for postconviction relief. Fortune argues that: (1) the circuit court should have granted his motion to suppress; and (2) the circuit court erred when it conducted *in camera* proceedings to assess the reliability of the confidential informant and refused to provide his postconviction counsel with a copy of the sealed *in camera* transcript. We affirm.

¶2 Fortune was released on extended supervision after serving prison time for a drug conviction. The Department of Corrections agent supervising Fortune received a tip that he had drugs in his possession. Two agents searched Fortune’s home, discovering cocaine, marijuana, and methylenedioxymethamphetamine (MDMA). Fortune moved to suppress the evidence, arguing that the agent did not have reasonable grounds for the search. The circuit court conducted an *in camera* proceeding to assess the reliability of the confidential informant. The court concluded that the agent had reasonable grounds for the search and denied Fortune’s motion to suppress the evidence. Fortune then pled guilty to all three counts.

¶3 Fortune first argues that the search violated his rights under the Fourth Amendment because it was not based on reasonable grounds to believe that he had contraband. “The Fourth Amendment affords protection only against searches that are unreasonable, and what is unreasonable for a [person on supervision] differs from what is unreasonable for a law-abiding citizen.” *State v. Purtell*, 2014 WI 101, ¶22, 358 Wis. 2d 212, 851 N.W.2d 417. While “[l]aw-

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

abiding citizens are entitled to the full panoply of rights and protections provided under the Fourth Amendment,” the Fourth Amendment rights of persons who have been conditionally released from prison “are significantly curtailed.” *Id.* (citation omitted). This is because the agent supervising the conditionally released person ““must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a [person on supervision] does damage to himself or society.”” *Id.*, ¶25 (citation omitted).

¶4 The Wisconsin Administrative Code permits an agent to search the property of a person under supervision ““if there are reasonable grounds to believe that the quarters or property contain contraband.”” *Id.*, ¶26, citing WIS. ADMIN CODE § DOC 328.21(3)(a) (Dec. 2006).<sup>2</sup> In determining whether there are reasonable grounds to believe that the property of an offender contains contraband, the agent “shall consider any of the following” factors:

- (a) The observations of staff members.
- (b) Information provided by informants.
- (c) The reliability of the information provided by an informant. In evaluating the reliability of the information, the field staff shall give attention to the detail, consistency and corroboration of the information provided by the informant.
- (d) The reliability of the informant. In evaluating the informant’s reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply accurate information.

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<sup>2</sup> Throughout this opinion, we refer to the version of the Wisconsin Administrative Code that was in effect when Fortune’s home was searched. WISCONSIN ADMIN. CODE § DOC 328 has since been repealed and recreated.

- (e) The activity of the client that relates to whether the client might possess contraband or might have used or be under the influence of an intoxicating substance.
- (f) Information provided by the client that is relevant to whether the client has used, possesses or is under the influence of an intoxicating substance or possesses any other contraband.
- (g) The experience of a staff member with that client or in a similar circumstance.
- (h) Prior seizures of contraband from the client.
- (i) The need to verify compliance with rules of supervision and state and federal law.

WIS. ADMIN. CODE § DOC 328.21(7). Warrantless searches of persons on supervision in Wisconsin conducted pursuant to the factors set forth in WIS. ADMIN. CODE § 328.21(7) satisfy “the demands of the Fourth Amendment because [they are] carried out pursuant to a regulation that itself satisfies the Fourth Amendment’s reasonableness requirement under well-established principles.” *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *see also State v. Jones*, 2008 WI App 154, ¶20, 314 Wis. 2d 408, 762 N.W.2d 106.

¶5 Fortune argues that his agent did not have reasonable grounds to search his home based on the informant’s tip because the State did not establish that the informant or the information was reliable, pointing to sub. (c) and (d). Fortune misreads the regulation. WISCONSIN ADMIN. CODE § DOC 328.21(7) does not require the agent to consider *all* of the listed factors in determining whether there are reasonable grounds for a search. It provides that an agent “shall consider *any* of the following” factors, one of which is “[i]nformation provided by informants.” (Emphasis added.) Although the regulation lists other factors for consideration that bear on the reliability of the informant or the reliability of the information provided by the informant, the regulation does not *require* that any

particular information be established prior to the search as long as the agent considers one or more of the factors listed in WIS. ADMIN. CODE § DOC 328.21(7).

¶6 Fortune’s agent complied with the administrative code by considering “information provided by an informant” in deciding whether to conduct a search. The informant, who identified herself to the agent, thus bolstering the reliability of her information, told the agent that Fortune was transporting drugs, particularly marijuana, and that the last time she encountered him, he had two pounds of marijuana with him and wanted a ride from her. The informant further stated that when she refused to give him a ride, he hit her. Both the agent and the agent’s supervisor spoke to the informant, who gave them consistent stories. Based on the information provided by the informant, the agent had reasonable grounds to search Fortune’s home.<sup>3</sup>

¶7 Fortune also attempts to challenge the search by arguing that the agent’s Search Plan was deficient. The Wisconsin Administrative Code does not require that Search Plans be developed prior to searching the homes of persons on supervision. *See* WIS. ADMIN. CODE § DOC 328.21. Therefore, the sufficiency of the Search Plan has no bearing on whether there were reasonable grounds for the search.

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<sup>3</sup> To the extent Fortune is attempting to argue that establishing the reliability of the informant was constitutionally required, we have already explained that “the Fourth Amendment’s reasonableness requirement” is satisfied by warrantless searches of persons on supervision in Wisconsin conducted pursuant to the factors set forth in WIS. ADMIN. CODE § 328.21(7). *See Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

¶8 Fortune next argues that the circuit court should not have conducted an *in camera* proceeding to assess the reliability of the confidential informant. Fortune’s argument is unavailing. The circuit court was authorized to conduct an *in camera* examination of the confidential informant without either counsel present in order to assess whether the informant was reliable pursuant to WIS. STAT. § 905.10(3)(c). Fortune also contends that the circuit court erred in refusing to provide his postconviction counsel with a transcript of the *in camera* proceeding. Again, the circuit court acted in accord with § 905.10(3)(c), which provides that the record of the *in camera* proceeding “shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the ... state.” *Id.* Therefore, the circuit court properly denied postconviction counsel’s motion for a copy of the transcript.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

